BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF DON GOODWIN AND ORAN FORE, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB Nos 821 and 829 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

These are two appeals, consolidated for hearing, arising from the denial of two applications for the withdrawal of artificially stored groundwaters. Hearing was convened before the Pollution Control Hearings Board, W. A. Gissberg, Chairman, presiding, Chris Smith and Dave J. Mooney, at Spokane, Washington on December 1 and 2, 1977. Respondent elected a formal hearing pursuant to RCW 43.21B.230. The last post-hearing brief in this matter was received on February 6, 1978.

Appellants appeared by and through their attorney, Lawrence L.

Tracy. Respondent appeared by and through its attorney, Laura E. Eckert, Assistant Attorney General. The Spokane reporting firm of Reiter, Storey and Miller recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. Having heard the testimony and examined the exhibits, and having considered the briefs and arguments of counsel, and being fully advised, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Appellant Don Goodwin owns land three miles west of Moses Lake, Washington, and adjacent to Interstate Highway 90. Appellant Oran H. Fore owns land three miles northeast of Mr. Goodwin's.

II

In 1964, appellant Goodwin obtained a public groundwater right to irrigate about one half of his acreage. He forwent the opportunity of seeking public groundwater for the balance of his acreage at that time. His primary reason for not seeking additional water was his belief that the balance of his acreage was not arable, even with irrigation. An official of the respondent, Department of Ecology, also advised Mr. Goodwin that groundwater for irrigation would probably continue in good supply despite a then-pending federal claim to the groundwater in that vicinity. Mr. Goodwin was not told that he could not apply for additional groundwater at that time.

III

In 1972, agricultural advances made the balance of Mr. Goodwin's land arable. Anticipating the use of this land either for agriculture

or sub-division into lots, Mr. Goodwin made application for a right to withdraw public groundwater on October 2, 1972.

Appellant Fore rade application to withdraw public groundwater, to irrigate his land, on March 25, 1974.

IV

The United States Columbia Basin Project is a major federal program by which the waters impounded by the Grand Coulee Dam are made available to farmers for irrigation. Long canals, or "wasteways" transport the water south from Grand Coulee through agricultural regions where smaller canals branch out into the fields. Water not diverted into the fields along these wasteways flows into the federal Potholes Reservoir, and is channeled further south from there. It had long been the contention of the United States that at least some of the water brought by these canals, and applied to fields for irrigation, found its way below ground and becare stored as groundwater. This artificially stored groundwater commingled with the groundwater occurring naturally, and referred to by state law as "public" groundwater, RCW 90.44.035 and .040.

On January 8, 1975, the State of Washington, through the Department of Ecology (DOE), accepted the declaration of the United States of America that a commingled portion of the groundwater in the area between Grand Coulee and Potholes Reservoir had been artificially stored by the Columbia Basin Project and hence was owned by the United States. See RCW 90.44.130. After lengthy study and consideration, it was agreed by the United States that, in return for the State's acceptance of its declaration of ownership, it would

allow the appropriation of 197,000 acre/feet per year of its artificially stored groundwater. This amount was calculated as the maximum amount which could be withdrawn without adverse effect upon the Columbia Basin Project. It was contemplated, however, that all of the agreed 197,000 acre/feet per year would be withdrawn from areas set back from and not in direct hydraulic continuity with the wasteways or Potholes Reservoir.

On January 8, 1975, concurrently with accepting the federal declaration, DOE promulgated regulations (chapter 173-134 WAC) to administer groundwater appropriation in a manner consistent with the federal declaration of ownership. One such regulation, WAC 173-134-060 (2)(l), articulated the federal-state agreement that 197,000 acre/feet per year of federal artificially stored groundwater be set aside for appropriation. Another such regulation, WAC 173-134-060(2)(o), further articulated the federal-state agreement that appropriation was prohibited from wells on lands that hydraulically respond to changes in the water level in Potholes Reservoir. This latter, "buffer zone", regulation, was written in such a way that it arguably would not be effective until specific parcels of land were published in a regulatory order of the DOE:

> ". . . no applications for permits submitted pursuant to WAC 173-134-060(2) shall be approved for withdrawals of artificially stored ground waters from wells located on lands adjacent to bureau wasteways and from wells located on lands underlain by ground water that hydraulically responds to changes in the water level in the Potholes Reservoir, where land areas are designated as provided in the next sentence. From time to time, when necessary to protect public and private

> interests in the Quincy subarea and to otherwise provide proper implementation of this chapter, the department shall, through the issuance of regulatory orders, designate specifically described geographic areas of land adjacent to the wasteways and lands underlain by ground waters that hydraulically respond to changes in Potholes Reservoir. . . .

On February 14, 1975, at the request of DOE, appellant Goodwin made application for a right to withdraw artifically stored groundwater at the same place and for the same uses as his earlier application for public groundwater. Appellant Fore did likewise on January 31, 1975. Both applications for artificially stored groundwater were accorded priority dates corresponding to the dates on which their earlier applications for public groundwater were filed.

On February 25, 1975, the DOE published a notice in the Wenatchee World which proposed specific parcels of land to be included in the buffer zone set up by WAC 173-134-060(2)(o), above. Appellants' applications were within the proposed buffer zone.

On March 18 and 31, 1975, (Exhibits A-2 and R-8) DOE denied each appellant's application for artificially stored groundwater, effective April 15, 1975, unless before that date, appellants applied for a new point of withdrawal outside the buffer zone. Neither appellant applied for a new point of withdrawal.

On March 19, 1975, DOE issued its regulatory order (DE 75-54, Exhibit R-7) placing the lands to which appellants' applications pertained into the buffer zone, as proposed.

V

There is groundwater available at the locations and in the

quantities applied for by appellants. However, there is direct hydraulic continuity between the groundwater underlying the lands owned by appellants, and the federal Potholes Reservoir such that withdrawals from wells on these lands will reduce the quantity of water in Potholes Reservoir, volume for volume.

VI

As of the date of this appeal, the DOE has neither approved, nor denied, nor issued any order with respect to the appellants' applications to withdraw public groundwater.

VII

Any Conclusion of Law hereinafter stated with may be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

Appellant Goodwin alleges that DOE is estopped from denying his application for artificially stored groundwater because of statements DOE made to him in 1964 advising that groundwater for irrigation would continue in good supply. Appellant reasons that DOE's assurance placed him off-guard and lulled him into seeking groundwater rights to only part of his land in 1964, whereas his application for groundwater rights for the balance of his land would have been approved if made then, rather than later. We reject appellant's theory of estoppel.

The elements of ordinary estoppel are 1) an admission, statement

or act inconsistent with the claim afterwards asserted, 2) action by the other party on the faith of such admission, statement or act; and 3) injury to such other party arising from permitting the first party to contradict or repudiate such admission, statement or act. Shafer v. State, 83 Wn.2d 618, 623, 521 P.2d 736 (1974).

We have found that Mr. Goodwin's primary reason for not seeking groundwater for the balance of his acreage, in 1964, was his belief that the land was not arable, even with irrigation. Thus, we conclude that the controlling reason for Mr. Goodwin's failure to apply for additional groundwater was his own evaluation of his land and not statements made by the DOE. The second, or reliance element, of the three elements of estoppel enumerated above is therefore absent.

Furthermore, we have found that the agricultural advances which made the balance of Mr. Goodwin's land arable had not occurred in 1964. Had an application for an irrigation groundwater right been made in 1964, therefore, it would then have been denied for lack of beneficial use. This denial would have left Mr. Goodwin in no better position than he is now. The third, or injury element, of the three elements of estoppel is therefore absent also.

For these reasons, appellant has not made out a case of ordinary estoppel. We therefore need not consider whether this would be a proper case for application of estoppel against a governmental agency. See Metropolitan Park District v. State, 85 Wn.2d 821, 539 P.2d 854 (1975).

II

At its outset, the Public Ground Water statute of this state

draws an important distinction between "public" and "artificially stored" groundwaters. RCW 90.44.035 and .040. Appellants have each filed two, separate applications--one for public and the other for artificially stored groundwater. In this appeal there is no order of the DOE with respect to the applications for public groundwater. This Hearings Board is therefore without jurisdiction to review or adjudicate those applications. RCW 43.21B.110.

III

We turn now to appellants' applications for artificially stored groundwater. Appellants' urge that DOE cannot deny these applications under WAC 173-134-060(2)(o) prohibiting withdrawals in buffer zones. To do so, say appellants, requires the invalid, retroactive application of the regulatory order, DE 75-54, by which the buffer zone was specifically identified on March 19, 1975.

To determine whether a regulation was applied retroactively or prospectively, we must establish the time at which the appellants obtained a vested right to the law governing their applications for artificially stored ground water. We agree with the position of DOE that this was not the time of application; and, we conclude that appellant's right could not vest prior to a final order by DOE granting or denying the applications. Stempel v. Department of Water Resources, 82 Wn.2d 109 (1973). By their own terms DOE's letters to appellants now on appeal (Exhibits A-2 and R-8) were only conditional denials, not to be final until April 15, 1975, provided that appellants did not take certain action before that date. April 15, 1975, was therefore the earliest date upon which DOE's denial would be final, the earliest date

upon which appellants could obtain a vested right to the law governing their applications, and a date on which the buffer zone regulation (WAC 173-134-060(2)(o) and DE 75-54) of March 19, 1975, could only be applied prospectively.

We therefore conclude that appellants have applied to withdraw artificially stored groundwater from within a buffer zone where such withdrawals are prohibited by WAC 173-134-060(2)(o) and DE 75-54, both of which were prospectively and validly applied to appellants.

IV

There is yet a further basis for denying appellants' applications for artificially stored groundwater. Let us assume, for the purposes of argument, that DOE never adopted WAC 173-134-060(2)(o) and DE 75-54 enumerating parcels that comprise a buffer zone. Nevertheless, the history of the federal-state negotiations in the Quincy Subarea would require the same result in this case. This is so because the United States and State of Washington, after long deliberation, arrived at a solemn agreement by which the federal declaration of artificially stored groundwater would be accepted by the state in return for a federal promise to allow a large quantity of that groundwater to be appropriated by such persons as appellants. That federal promise to allow appropriation was subject to the limitiation, however, that withdrawals not be allowed from groundwaters in direct hydraulic continuity with Potholes Reservoir whose waters were previously committed to customers of the Columbia Basin Project.

Appellants have applied to withdraw artificially stored groundwater which is in direct hydraulic continuity with Potholes Reservoir. Should

the DOE issue permits for the applications now before us, they would be acting to undermine the solemn agreement between the United States and the State of Washington thereby jeopardizing any appropriation of artificially stored groundwater and threatening to reopen the dispute settled by that federal-state agreement. Should DOE issue permits for the applications now before us, it would therefore act in contravention of the "public interest" as prohibited by WAC 173-136-040(1)(b) and contrary to the interest of the federal declaration holder as prohibited by WAC 173-134-060(2)(a) and WAC 173-134-060(3)(a).

V

The DOE letters now on appeal (Exhibits A-2 and R-8) should be affirmed insofar as they deny appellants' applications for artificially stored groundwater.

VI

Any Finding of Fact which is deemed to be a Conclusion of Law is hereby adopted as such.

ORDER

The Department of Ecology denial of appellants' applications for artificially stored groundwater (Applications QB-263 and QB-85) is hereby affirmed.

DONE at Lacey, Washington, this 13th day of March, 1978.

POLLUTION CONTROL HEARINGS BOARD

DAVE J. MOONEY, Chairman

CHRIS SMITH, Member